IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 238

DAVID I. WELLS,

Appellant,

—v.—

NELSON A. ROCKEFELLER, as Governor of the State of New York, LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, JOHN P. LOMENZO, as Secretary of State of the State of New York, MALCOLM WILSON, as Lieutenant Governor of the State of New York, and Presiding Officer of the Senate of the State of New York, and ANTHONY J. TRAVIA, as Speaker and Presiding Officer of the Assembly of the State of New York,

Appellees.

JURISDICTIONAL STATEMENT

ROBERT B. MCKAY
40 Washington Square South
New York, New York 10003.
Attorney for Appellant

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States District Court for the Southern District of New York, entered on April 1, 1968, denying the objections of appellant and others to the constitutionality of Chapter 8 of the New York Laws of 1968, and holding that the con-

gressional districting plan set forth in the said Chapter 8 complies with the opinion of that District Court, dated May 10, 1967, and the order dated July 26, 1967, and is in conformity with the Constitution of the United States.

Opinions Below

The opinions of the District Court for the Southern District of New York are reported at 273 F. Supp. 984 (May 10, 1967), and 281 F. Supp. 821 (March 20, 1968).

Jurisdiction

This suit was brought under Article I, Section 2 and the Fourteenth Amendment of the United States Constitution, and under 42 U.S.C. §§ 1983, 1988 and 28 U.S.C. § 1343(3). Declaratory relief was sought under 28 U.S.C. §§ 2201, 2202, and 2281 et seq. The jurisdiction of the Supreme Court of the United States to review this case by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b).

Questions Presented

1. Whether the equal-population principle of *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), is violated by a congressional districting plan in which the population variations among the districts could have been materially reduced and the degree of compactness of the districts could have been materially increased by adoption of any of several alternative plans, including those presented to the court by appellant.

2. Whether a congressional districting plan concededly drawn to preserve political "proportionality" constitutes a gerrymander forbidden by Article I, Section 2 of the Constitution of the United States, or by the Equal Protection or Due Process Clauses of the Fourteenth Amendment to that Constitution.

Statute Involved

Chapter 8 of the New York Laws of 1968.

Statement

Appellant, David I. Wells, is a citizen of the United States, and a resident of Queens County in the City and State of New York. He is a taxpayer and a registered voter of said county, city and state. As such he is entitled to vote for candidates for the House of Representatives in the sixth congressional district of New York State in which he also resides.

Appellant was one of two plaintiffs (the other not being joined in this appeal) who filed this suit on June 29, 1966, in the United States District Court for the Southern District of New York against appellee Nelson A. Rockefeller, Governor of New York State, and other state officials directly implicated in the process by which the Members of the House of Representatives from New York State are chosen by the voters of that state.

In the original complaint the then plaintiffs asked for the convening of a three-judge court which was in turn asked to hold invalid and unenforceable Article VII, Section 111, Chapter 980 of the Laws of 1961 of New York State (effective from January 1, 1962) as being contrary to Article I, Section 2 and the Fourteenth Amendment to the Constitution of the United States. Accordingly, plaintiffs asked that the court restrain defendants Rockefeller, Lefkowitz, and Lomenzo from in any way implementing the complained-against provisions of the election laws. Appellants further asked the court to direct defendants Wilson and Travia, in their capacity as legislative leaders in the State of New York, "to take such action as may be directed by this Court to secure compliance with the Constitution of the United States."

A three-judge court was convened to hear the matter, and the issues were framed by plaintiffs' motion for summary judgment and defendants' motion to dismiss the complaint. Relevant facts about the statute were these: On the basis of the 1960 census figures Congress reduced the number of New York's Congressional Representatives from 43 to 41, and Chapter 980 was enacted to establish the boundary lines of these 41 districts. However, as the court below found, the districts did not satisfy the test of "equal representation for equal numbers of people" established in *Wesberry* v. *Sanders*, 376 U.S. 1, 18 (1964). For example, the twelfth district (part of Kings County) had a population of 471,001, 15.1 per cent above average, while the adjoining fifteenth district (also part of Kings County) had a population of 350,635, 14.3 per cent below average—a spread between these two contiguous districts of 29.4 per cent.

The court, after pointing out other excessive population differentials, observed that further comments on "the seemingly bizarre structure of the present Congressional districts were unnecessary" to the holding of unconstitutionality. 273 F. Supp. at 987. Accordingly, the court held that "reapportionment is required." *Id.* at 989. The court said the Legislature should "divide the State into 41 substantially equal parts, provided they be reasonably compact and contiguous." *Id.* at 991. As to timing the right was declared to be a present one; accordingly, the District Court ruled that no further elections could be held based on the invalid districts. The court ruled (at 992):

> a plan must be created by the 1968 Legislature which will provide for congressional districts in conformity with the Supreme Court's precepts so that the People of the State of New York may vote for

their congressmen from such districts in the 1968 congressional elections.*

The judgment of the District Court was affirmed per curiam by this Court on December 18, 1967. 389 U.S. 421 (1967). Mr. Justice Harlan dissented, believing that "the time has come for this Court to provide clearer guidance to the lower courts on the proper remedy in reapportionment cases." *Id.* at 424.

The New York Legislature took no action until February 26, 1968, a date so late that it was impractical to secure effective review of a district court decision upholding the validity of the revised districts. It thus became necessary to hold the 1968 election under the new plan unless (as no one favored) election of all 41 Congressmen should be at large.**

The plan adopted by the Legislature on February 26, 1968 (Chapter 8 of the Laws of 1968) left population disparities ranging up to 6.6 per cent variation from the state average district population. The "lack of compactness" complained against in the original complaint, which had been described as "bizarre" by the court, remained unchanged in many districts and little changed in others. Although the District Court had said in its 1967 opinion that "there is a burden on the proponent of any districting plan to justify deviations from equality" (273 F. Supp. at 987), defendants (hereafter the State) advanced no jus-

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* The court also invited legislative consideration of population statistics later than the 1960 census figures, suggesting a projection to December 31, 1966. 273 F. Supp. at 992. However, this was rejected by the Legislature and not further adverted to by the court in its subsequent opinion. 281 F. Supp. 821. The issue is not raised in this case.

** The hearing before the three-judge court was on March 12, 1968; the opinion was delivered on March 20; and judgment was entered on April 1, the day before the first day to circulate nominating petitions for the primary to be held on June 18, 1968.

tification for continued population deviations and continued lack of compactness other than the exigencies of time and the legislative purpose to disrupt existing districts as little as possible.

The District Court, which had retained jurisdiction of the action, received objections, including those of intervenors, at a hearing on March 12, 1968. The State sought to justify the plan on the basis of the explanation for the changes that appeared in the Interim Report of the Joint Legislative Committee on Reapportionment.

Intervenors Frederick W. Richmond, a resident of the fourteenth district, Eugene Victor, a resident of the old twelfth and the new fifteenth district, and Armand J. Starace, a resident of the Bay Ridge area of Kings County, all complained of the way the districts were drawn in that county. They argued that the integrity of neighborhoods had been violated and that the new lines represented bipartisan agreement to protect incumbents.

Intervenors Mary Leff and Kathryn Goldman objected to the new lines for the twenty-first and twenty-third districts in Bronx County.

Intervenors Andrew Cooper, Paul S. Kerrigan, and Joan C. Bacchus were primarily interested in Kings County districts. John R. Pillion also intervened.

Intervenors Samuel I. Popack, Simon Goldman, Shirley Levitin, Danny Carter, Israel Chanowitz and Rabbi S. H. Fox objected to the division of their community, Crown Heights in Brooklyn, between the new tenth and twelfth districts.

In an opinion announced on March 20, 1968, the three-judge court upheld the plan, observing that it would give the voters "an opportunity to vote in the 1968 and 1970

elections on a basis of population equality within reasonably comparable districts." 281 F. Supp. at 826. This appeal is taken from the judgment and order entered pursuant to that holding.

The Questions Are Substantial

The issues in this appeal are in part similar to those in *Kirkpatrick* v. *Preisler,* No. 1116, and *Heinkel* v. *Preisler,* No. 1117, in both of which jurisdiction was noted on March 4, 1968, 390 U.S. 939. In these two cases, whose earlier history was traced in *Preisler* v. *Secretary of State,* 257 F. Supp. 953 (W.D. Mo. 1966), aff'd per curiam, 385 U.S. 450 (1967), the three-judge district court held in its most recent opinion on December 12, 1967, that the congressional districts established by the Missouri Legislature were invalidly constituted. This Court, in noting probable jurisdiction, granted a stay of the judgment of the lower court pending final decision on the appeals, denied a motion to advance, and allowed the State of Missouri to conduct its 1968 elections pursuant to the 1967 statute which had been successfully challenged in the court below.

In those cases, as in the present proceeding, a principal issue relates to the claim of excessive and therefore unconstitutional population disparity among election districts. In those cases, as in the present proceeding, the 1968 elections will be held on the basis of the districts established in the challenged statute. The noting of probable jurisdiction in Numbers 1116 and 1117 for argument in the October Term 1968 indicates this Court's recognition of the need for further clarification of the meaning of the equal-population principle for the guidance, not only of the Missouri Legislature, but as well for the benefit of the many legislatures throughout the country which in little more than two years will have to redraw district lines for congressional and state legislative election districts. The present case, which acutely presents this issue, as well as

a classic instance of gerrymander for partisan advantage, is an ideal case to consider along with the Missouri case. Appellant asks that probable jurisdiction be noted and that this case be set for argument with Numbers 1116 and 1117.

Since 1964, when this Court first held that substantial population equality is a constitutional requirement in congressional districting (*Wesberry* v. *Sanders*, 376 U.S. 1) and in state legislative representation (*Reynolds* v. *Sims*, 377 U.S. 533), the continuing importance of the problem has been manifested by the necessity for this Court's passing on a number of further issues. The more significant rulings include the following: *Scranton* v. *Drew*, 379 U.S. 40 (1964); *Fortson* v. *Toombs*, 379 U.S. 621 (1965); *Scott* v. *Germano*, 381 U.S. 407 (1965); *Travia* v. *Lomenzo*, 381 U.S. 431 (1965); *Drum* v. *Seawell*, 383 U.S. 831 (1966), affirming 249 F. Supp. 877 (M.D.N.C. 1965); *Burns* v. *Richardson*, 384 U.S. 73 (1966); *Alton* v. *Tawes*, 384 U.S. 315 (1966), affirming 253 F. Supp. 731 (D. Md. 1966); *Swann* v. *Adams*, 385 U.S. 440 (1967); *Preisler* v. *Missouri*, 385 U.S. 450 (1967), affirming 257 F. Supp. 953 (W.D. Mo. 1966); *Lucas* v. *Rhodes*, 389 U.S. 212 (1967), reversing — F. Supp. — (N.D. Ohio 1967); *Rockefeller* v. *Wells*, 389 U.S. 421 (1967), affirming 273 F. Supp. 984 (S.D.N.Y. 1967); *Dinis* v. *Volpe*, 389 U.S. 570 (1968), affirming 264 F. Supp. 425 (D. Mass. 1967); *Kirk* v. *Gong*, 389 U.S. 574 (1968), affirming — F. Supp. — (S.D. Fla. 1967); *Branigin* v. *Duddleston*, 36 U.S.L. Week 3440 (U.S. May 20, 1968), affirming — F. Supp. — (S.D. Ind. 1968).

Despite the fact that these issues have come to the Court in a variety of ways over a period of more than four years, no one suggests that all the answers essential for the guidance of state legislatures and lower courts have been provided on the equality question.

Moreover, this Court has given no direction on the important issues of compactness and the gerrymander, which are graphically presented in this case.

The way in which these issues, population equality and gerrymander for partisan advantage, are presented in this case is briefly reviewed below.

1. *The equal-population principle.* In determining what degree of equality is essential to satisfy the equal-population standard required for congressional districting, the three propositions outlined below should now be considered established. But none of these principles is satisfied by Chapter 8 of the New York Laws of 1968.

a. The standard of equality required in congressional districting is more exacting even than in state legislative districting. See *Reynolds* v. *Sims*, 377 U.S. 533, 577-78 (1964). The population deviations among the congressional districts in New York under the 1968 statute range from 6.6 per cent below the average congressional district population to 6.5 per cent above. The percentage spread from the smallest district to the largest in the state is 53,613, more than 14 per cent. Moreover, the population differential even between *adjacent* districts is unaccountably large. For example, two adjacent districts in the western part of the state, the thirty-eighth and thirty-ninth, differ by 53,116. In the northern part of the state the thirty-first district is 40,499 larger than the adjacent thirty-second district.

b. The obligation to seek the maximum degree of equality reasonably attainable rests on the State, primarily on the legislative branch. As this Court noted in *Swann* v. *Adams*, 385 U.S. 440, 443-45 (1967),* it is quite obvious

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* Although *Swann* v. *Adams* involved state legislative districting, this Court has cited the case and this principle in subsequent congressional districting cases. See, *e.g.*, *Duddleston* v. *Grills*, 385 U.S. 455 (1967).

that the State could have come much closer to providing districts of equal population than it did. Appellant specifically placed before the District Court a plan, with alternatives, that revealed the practicality of establishing much smaller variations between the districts. Appellant's alternatively offered plan demonstrated that population differentials could have been substantially reduced even without disturbing county lines not already broken under the Legislature's plan, and even increasing the number of towns and cities kept intact.

The court below, in its opinion of May 10, 1967, holding the 1961 statute unconstitutional, stated that there were, under that statute, "districts where the transferral of a single county as a unit to an adjacent district would greatly lessen the present district disparity." 273 F. Supp. at 991. Identical difficulties exist in the 1968 plan now at issue.

The clearest and most obvious example relates to Lewis County, in the north central part of the State. There is a difference of 40,499 between the populations of the adjacent thirty-first and thirty-second congressional districts. If, however, Lewis County had been included in the latter rather than the former district, the population difference would have been only 5,999. And if such a change had been accompanied by a shift of Hamilton County from the thirtieth to the thirty-first district, the population difference between the thirty-first and thirty-second districts would then have been reduced to a mere 1,732.

Under the plan passed by the Legislature, the populations of these three districts are:

30th C.D. ..... 415,030 (1.4% above average)

31st C.D. ..... 425,905 (4.1% above average)

32nd C.D. ..... 385,406 (5.8% below average)

(average deviation: 3.8%)

But if Lewis and Hamilton Counties had been placed in districts in such a way as to keep the population-differences to a minimum, the figures would have been:

30th C.D. ..... 410,763 (0.4% above average)

31st C.D. ..... 406,923 (0.6% below average)

32nd C.D. ..... 408,655 (0.2% below average)

(average deviation: 0.4%)

Furthermore, if Rensselaer County had been placed in the twenty-ninth district and Schenectady County in the thirtieth (instead of the other way around) the sizable deviation in population of the twenty-ninth district (4.0%) could also have been substantially reduced.

Relevant to this situation is the comment of the New Jersey Supreme Court in *Jones* v. *Falcey*, 48 N.J. 25, 40, 222 A. 2d 101, 109 (1966).

> where the deviation obviously exceeds that needed to permit the use of political subdivisions, the deviation spells out unconstitutionality, and a court must so hold unless the record affirmatively reveals a tenable basis for the legislative action.

In another situation, involving the districts at the western end of New York State, the wide difference between the populations of the adjacent thirty-eighth and thirty-ninth districts could have been completely eliminated by a more rational districting arrangement. The difference between the populations of those two adjacent districts (one of them the smallest in the State, the other the third largest) is 53,116. But if the Erie County towns of Concord, Collins, North Collins, Eden, Evans and Brant, and the Cattaraugus Indian Reservation had been placed in the thirty-eighth district instead of the thirty-ninth, and if a few minor boundary adjustments had been made within the City of Buffalo, the populations not only of the

thirty-eighth and thirty-ninth districts but of the adjacent fortieth and forty-first districts as well could have been made almost exactly equal. (The thirty-eighth district would then have a population of 421,942, and the thirty-ninth, fortieth, and forty-first districts would all have populations quite near an average of 422,431. All four districts would then deviate from the state average by a little more than 3 per cent, whereas under the districting passed by the Legislature, they deviate by 6.6 per cent, 6.4 per cent, 6.4 per cent and 6.5 per cent respectively.

The State may contend that the aforementioned Erie County towns were not included in the thirty-eighth district because to do so would have meant crossing the boundary of Erie County. However, the Erie County boundary is *already* crossed by a congressional district line: the fortieth district includes Niagara County *and* a portion of Erie. As the New Jersey Supreme Court stated in *Jones* v. *Falcey*, 48 N.J. at 37, 222 A. 2d at 107-108.

> we can find no . . . justification for . . . deviations where county lines are broken and the mathematical ideal could be more nearly approached by redeployment of whole municipalities lying at the borders of the districts.
>
> . . . the command is to achieve population equality "as nearly as practicable," and if equality would be more nearly achieved by shifting whole municipalities to a contiguous district, the draftsman has not achieved equality "as nearly as practicable," unless some other constitutionally tenable reason . . . can be shown to justify the disparity. If the lines of political subdivisions are ignored, there is no reason for not achieving mathematical equality. . . .

c. Deviations from equality require justification, and the burden is on the state to supply rational explanation for instances of inequality. See *Swann* v. *Adams*, 385 U.S.

440, 443-45 (1967). As the court below said in the first opinion in the present case, "there is a burden on the proponent of any districting plan to justify deviations from equality." 273 F. Supp. at 987.

In this case the State offers no reason except the alleged shortness of time (May 10, 1967 to February 26, 1968); inconvenience to election officials, voters, and candidates for office in dislocation of district lines; and the need for "proportional" representation of political interests. The unacceptability of district lines drawn to accommodate partisan advantage is discussed in Point 2 below. The other two arguments, alleged shortness of time and convenience, are equally unacceptable.

This Court has said that the right of each voter to equal representation is a present right and not one that can be casually deferred for the convenience of election officials or for the advantage of political leaders. *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964). The principle would be denied its principal significance, and all its immediacy, if the equal-population principle could be so easily subverted.

2. *Partisan Gerrymandering.* This Court has never squarely passed on two related questions: (1) whether "compactness and contiguity are aspects of practicable equality," as was asserted in *Drum* v. *Seawell*, 250 F. Supp. 922, 925 (M.D.N.C. 1966), a position with which we fully agree; and (2) whether election districts gerrymandered for purposes of racial, political, or any other kind of discrimination are constitutionally forbidden. In *Wright* v. *Rockefeller*, 376 U.S. 52 (1964) and *Honeywood* v. *Rockefeller*, 376 U.S. 222 (1964) this Court found it unnecessary to reach the question. In *Fortson* v. *Dorsey*, 379 U.S. 433 (1965) the Court also did not reach the question, but

commented on a closely related issue in these significant words (p. 439):

> It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.

We submit that the present case presents in sharp form the permissibility or not of congressional district lines drawn for partisan advantage.

In this case the District Court stated in its first opinion that the legislators must "not allow considerations of race, sex, economic status or *politics* to cross their minds." (Emphasis supplied.) 273 F. Supp. at 991. But the legislature was not faithful to that injunction. The 1968 congressional districts for New York State, as illustrated on the accompanying maps, demonstrate clearly that the lines were drawn to accomplish some purpose other than that of equality, political unit integrity, or even neighborhood preservation. The vise-like, interlocking segments of the sixth and eighth districts in Queens County make the point, as does the "horse's tail" added to Congressman Jonathan Bingham's twenty-third district in Bronx and New York Counties to make more difficult his renomination, and as does the continuing anomaly of the 200-mile-long thirty-fifth district.

If the maps leave any doubt in the viewer's mind, we submit that the remarkable candor of appellee's counsel at the hearing on March 12, 1968, tells the whole story (R. 681-82):

> There is no reason why in a county which will have four Congressmen the Legislature cannot apportion in a manner so as to give some recognition—some,

not even proportional, mind you, but some recognition to a minority which captures 43 per cent of the vote.

. . . .

. . . . It is a rational policy for a state in a multi-district county to design the districts so as to provide the minority with some representation.

CONCLUSION

We believe these issues merit prompt decision. Appellant urges reversal and remand with directions for congressional redistricting in New York State consistent with the equal-population principle and free of partisan gerrymander, or any other.

Respectfully submitted,

ROBERT B. MCKAY
Attorney for Appellant

APPENDIX A

Population of New York Congressional Districts (1968) and Percentage Deviations From Average

1st C.D.	393,585	—3.8
2nd C.D.	393,465	—3.9
3rd C.D.	393,434	—3.9
4th C.D.	393,183	—3.9
5th C.D.	393,288	—3.9
6th C.D.	434,615	+6.2
7th C.D.	434,750	+6.2
8th C.D.	434,552	+6.2
9th C.D.	434,770	+6.2
10th C.D.	417,122	+1.9
11th C.D.	417,090	+1.9
12th C.D.	417,298	+1.9
13th C.D.	417,040	+1.9
14th C.D.	417,080	+1.9
15th C.D.	417,093	+1.9
16th C.D.	417,478	+2.0
17th C.D.	390,742	—4.5
18th C.D.	390,861	—4.5
19th C.D.	390,023	—4.7
20th C.D.	390,363	—4.6
21st C.D.	390,552	—4.6
22nd C.D.	390,492	—4.6

23rd	C.D.	390,228	—4.7
24th	C.D.	390,057	—4.7
25th	C.D.	420,146	+2.6
26th	C.D.	420,467	+2.7
27th	C.D.	409,349	——
28th	C.D.	396,122	—3.2
29th	C.D.	425,822	+4.0
30th	C.D.	415,030	+1.4
31st	C.D.	425,905	+4.1
32nd	C.D.	385,406	—5.8
33rd	C.D.	415,333	+1.5
34th	C.D.	423,028	+3.3
35th	C.D.	386,148	—5.7
36th	C.D.	410,943	+ .4
37th	C.D.	410,432	+ .3
38th	C.D.	382,277	—6.6
39th	C.D.	435,393	+6.4
40th	C.D.	435,684	+6.4
41st	C.D.	435,880	+6.5

maximum deviation: 6.6%

average deviation: 3.8%

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Appellees.

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENT

ROBERT B. MCKAY
40 Washington Square South
New York, New York 10003.
Attorney for Appellant

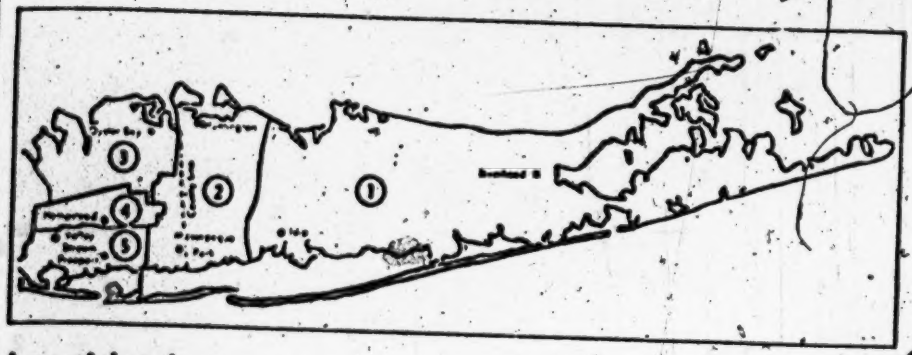
APPENDIX B

Map of New York State Congressional Districts

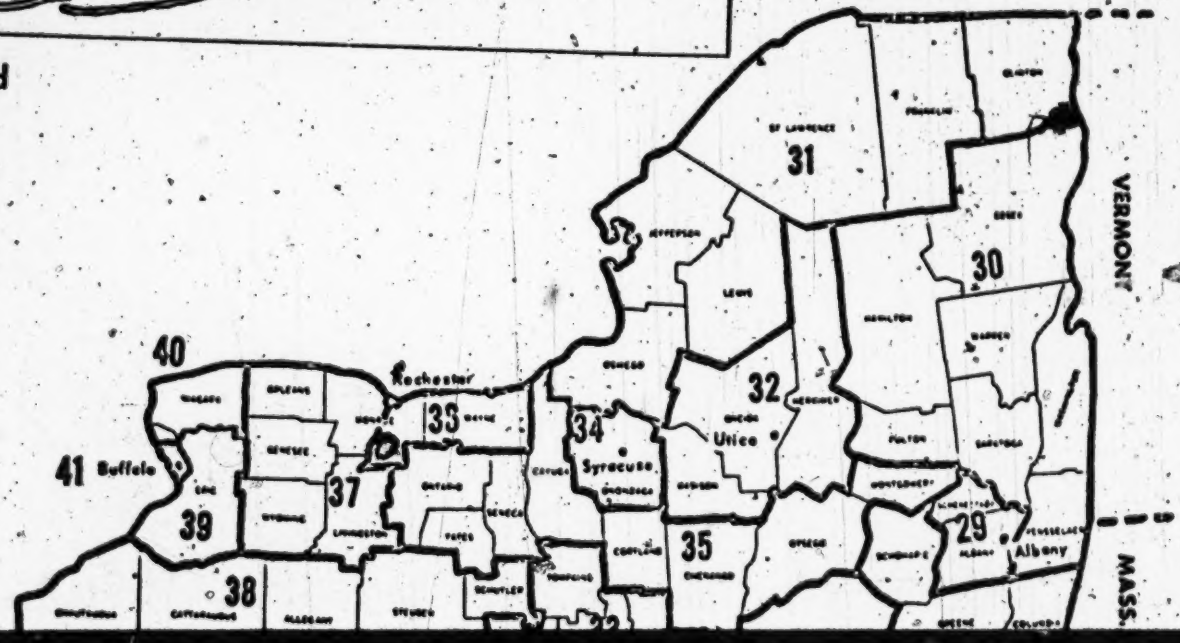
(Photoprint)

[For the convenience of Court and Counsel this Exhibit is bound in on the opposite page.]

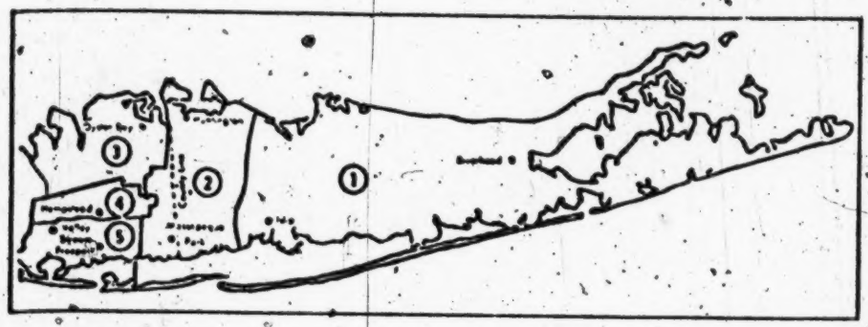
New Congressional Districts



Long Island



New Congressional Districts



Long Island